FILED
JUL 27 1949
CHARLES ELMORE CROPLEY

No. 142.

Supreme Court of the United States

October Term, 1949.

GENERAL BOX COMPANY, - - - Petitioner,

vs.

CENTRAL METAL PRODUCTS COMPANY, Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

CENTRAL METAL PRODUCTS COMPANY,
Respondent.

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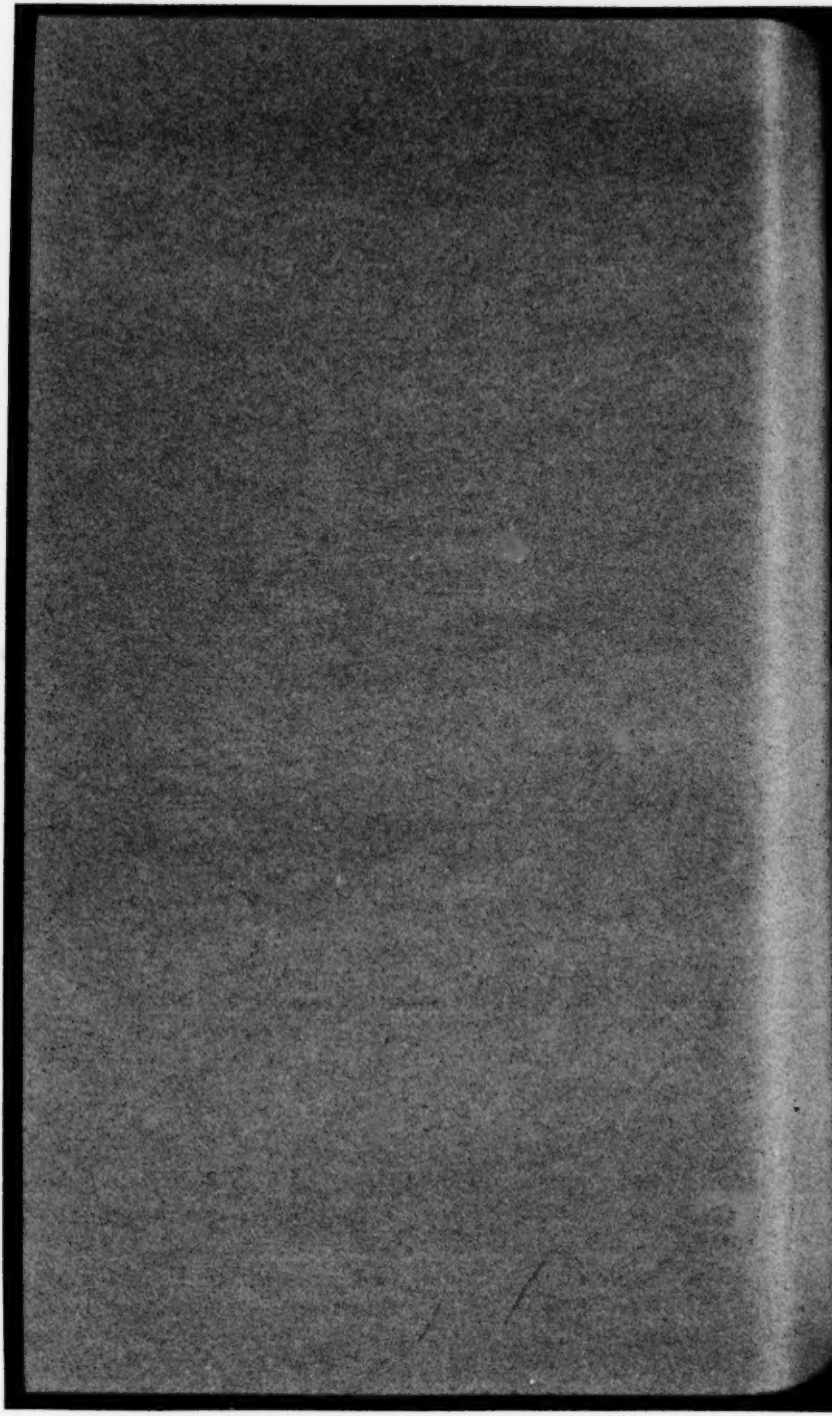

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your respondent respectfully states:

I.

STATEMENT OF LAW OF THE CASE AND RESPONDENT'S CONTENTIONS RELATIVE THERETO.

We submit that the questions raised by the petition do not come within the purview of Rule 38 of this Court in that

1. *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, has not changed the federal law announced and followed for more than a century relative to the office of remittitur;

2. The law of the Commonwealth of Kentucky relative thereto is in accord and agreement with the federal rule;

3. In a breach of contract action there is no requirement that the trial judge before granting a remittitur must be able to justify his action with mathematical certainty and precision;

4. (a) The parol evidence rule is one of procedure and not of substance;

(b) However, if we are in error in this statement, it is our contention that the law of the Commonwealth of Kentucky is not in conflict with the federal rule, in that evidence which sets forth the circumstances and conditions surrounding the making of a contract, and the position of the parties relative thereto is competent, when it is not introduced for the purpose of altering, contradicting or modifying the terms of the written contract;

(c) That Rule 43(a) of the Federal Rules of Civil Procedure is controlling on this point in the trial of actions before federal tribunals.

II.

ARGUMENT.

The Federal Rule Relative to the Right of the Trial Judge and the Appellate Court to Grant a Remittitur Is Not Violative of the Seventh Amendment to the Constitution and Has Prevailed From the Earliest Decisions of This Court to the Present Date.

Perhaps the earliest case allowing a remittitur is that of *Blunt* v. *Little,* Fed. Cas. 1578, decided by Mr. Justice Story in 1822. The doctrine there enunciated has been consistently sustained in the following cases:

Northern Pacific Railroad Co. v. *Herbert,* 116 U. S. 642, 646, 647, 6 S. Ct. 590, 29 L. Ed. 755; *Arkansas Valley Land & Cattle Co.* v. *Mann,* 130 U. S. 72-76, 9 S. Ct. 458, 32 L. Ed. 854; *Kennon* v. *Gilmer,* 131 U. S. 22, 29, 30, 9 S. Ct. 696, 33 L. Ed. 110; *Clark* v. *Sidway,* 142 U. S. 682, 690, 12 S. Ct. 327, 35 L. Ed. 1157; *Lewis* v. *Wilson,* 151 U. S. 551, 555, 14 S. Ct. 419, 38 L. Ed. 267; *Koenigsberger* v. *Richmond Silver Mining Co.,* 158 U. S. 41, 52, 15 S. Ct. 751, 39 L. Ed. 889; *German Alliance Ins. Co.* v. *Hale,* 219 U. S. 307, 312, 31 S. Ct. 246, 55 L. Ed. 229; *Cf. Gila Valley R. Co.* v. *Hall,* 232 U. S. 94, 104, 105, 34 S. Ct. 229, 58 L. Ed. 521; *Tevis* v. *Ryan,* 233 U. S. 273, 290, 34 S. Ct. 481, 58 L. Ed. 957; *Union Pacific R. Co.* v. *Hadley,* 246 U. S. 330, 334, 38 S. Ct. 318, 62 L. Ed. 751; Also see *Dimick* v. *Schiedt,* 293 U. S. 474, 55 S. Ct. 296; *Mutual Benefit Health & Accident Association* v. *Thomas* (1941), 123 Fed. 2d 353.

In the well-considered case of *Arkansas Valley Land & Cattle Co.* v. *Mann, supra,* the Supreme Court had this to say:

> "The practice which this court approved in Northern Pac. R. Co. v. Herbert, is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. Ducker v. Wood, 1 T. R. 277; Hewlett v. Cruchley, 5 Taunt. 277, 281; authorities cited in Sedgwick, Damages, 6th Ed. 762, note 2. But in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give *him* any cause for complaint. Notwithstanding such remission, it is still open to him to show, in the court which tried the case, that the plaintiff was not entitled to a verdict in any sum, and to insist, either in that court or in the appellate court, that such errors of law were committed as entitled him to have a new trial of the whole case.

"But it is contended that the plaintiff could not have been required to remit so large a sum as $22,833.33, except upon the theory that the jury, in finding their verdict, were either governed by passion, or had deliberately disregarded the facts that made for the defendant—in either of which cases, the duty of the court was to set aside the verdict as one not fit to be the basis of a judgment. Undoubtedly, if such had been the view which the court entertained of the motives or conduct of the jury, it would have been in accordance with safe practice to set aside the verdict and submit the case to another jury. That was the course pursued in Stafford v. Pawtucket Haircloth Co., 2 Cliff. 82. In that case Mr. Justice Clifford, after observing that the damages were greatly excessive and without support in evidence, said:

> 'Such errors may in many cases and under most circumstances be obviated by remitting the amount of the excess; but where the circumstances clearly indicate that the jury were influenced by prejudice or by a reckless disregard of the instructions of the court, that remedy cannot be allowed. Where such motives or influences appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding.'

"This court is not, however, authorized to assume, from the mere fact that $22,833.33 was remitted, that the court below believed that the jury were governed by prejudice, or willfully disregarded the evidence. On the contrary, it may be inferred that the amount for which the plaintiff was entitled to a verdict was ascertained by

the court, after a calculation based upon the prices of cattle as given by numerous witnesses; or that the court became satisfied that the preponderance of evidence as to the ownership of some of the cattle was against the plaintiff; or, as to other cattle, that they were not traced to the possession of the defendant. But, independently of this view, and however it was ascertained by the court that the verdict was too large by the above sum, the granting or refusing a new trial in a Circuit Court of the United States is not subject to review by this Court. Parsons v. Bedford, 28 U. S. 3, Pet. 433, 447; Mercantile Mut. Ins. Co. v. Folsom, 85 U. S. 18 Wall. 237, 248; New York Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 31. Equally beyond our authority to review, upon a writ of error sued out by a party against whom a verdict is rendered, is an order overruling a motion for a new trial, after the plaintiff, with leave of the court, has remitted a part of the verdict. Whether the verdict should be entirely set aside upon the ground that it was excessive, or was the result of prejudice, or of a reckless disregard of the evidence or of the instructions of the court, or whether the verdict should stand after being reduced to such amount as would relieve it of the imputation of being excessive, are questions addressed to the discretion of the court, and cannot be reviewed at the instance of the party in whose favor the reduction was made."

There are cases where the office of remittiture cannot be employed, as where the attorney uses prejudicial argument in his address to the jury and where as a result thereof or for any other reason it may be

clearly inferred that the jury's verdict was prompted by passion and prejudice. See *Arkansas Land & Cattle Co.* v. *Mann, supra; Minneapolis Railroad Co.* v. *Moquin,* 283 U. S. 520, 75 L. Ed. 1243; *National Surety Co.* v. *Jean,* 61 Fed. 2d 197.

In the case at bar, however, this did not occur, as evidenced by the statement of the trial judge in his memorandum opinion which reads as follows:

> "There is nothing in the record, and defendant's counsel has pointed out nothing in the record, to indicate any passion or prejudice or any appeal to any passion or prejudice on the trial" (Record 87).

The Kentucky Rule Relative to the Right of Granting a Remittitur.

The latest expression of the Court of Appeals of Kentucky relative to the right of the trial judge to grant a remittitur is found in *Otte* v. *Otte,* 259 Ky. 741, 83 S. W. 2d 42. This was an action for alienation of affections. Plaintiff recovered a verdict of $25,000. Plaintiff offered to remit $20,000 of the sum whereupon the Court overruled the motion for a new trial and entered a judgment for the sum of $5,000. The Appellate Court affirmed the action of the trial judge, and in so doing, made the following comment:

> "Conceding this, the appellant argues the action is to recover unliquidated damages, and, though it did so on the plaintiff's motion, the

court was without power to enter a judgment for an amount less than the sum fixed by the verdict.

* * * * * * *

"It is common practice for the courts when in their opinion a verdict for unliquidated damages is excessive, to give the plaintiff the option to avoid a new trial by consenting to the reduction of the verdict to the amount the court deems proper, but the authorities agree that the court is powerless in an action for unliquidated damages to render judgment for less amount than the verdict, unless the party in whose favor it was rendered requests or consents to the reduction, for a reduction without the consent of the recovering party invades the province of the jury. Dimick v. Schiedt, 293 U. S. 474, 55 S. Ct. 296.

* * * * * * *

"It does not follow that simply because the court, at the request or with the consent of the recovering plaintiff, directs a remittitur, an error is committed as to the defendant. The plaintiff's right to a verdict being established, the defendant cannot complain because the court, at the request or with the consent of the plaintiff, fixed the damages at a sum less than the amount of the verdict. The plaintiff is the only party who can complain of the remittitur, unless the evidence is brought here showing the contrary, and only then when he has not been given an option of a new trial or the right to elect to take an amount less than fixed by the verdict and refuses to consent to the remission. The recovering plaintiff has not appealed in the present case; and therefore the appellant, in the absence of the evi-

> dence, cannot question the ruling of the court in directing a remittitur which was favorable solely to her."

Other Kentucky cases dealing with this subject are *Engelman* v. *Central Bank,* 3 Ky. Op. 132; *N. C. & St. L.* v. *Henry,* 168 Ky. 453; *Green* v. *Anderson,* 102 Ky. 216.

In accordance with the Kentucky decisions above quoted, we submit that there is no conflict between the rule relative to remittitur in the Federal Courts and those in the State Courts. But if we are in error in this statement, it is our further contention that the remittitur rule as heretofore applied by the federal decisions is controlling by reason of the Seventh Amendment to the Constitution as indicated by the following authorities:

In *Mutual Benefit Health and Accident Association* v. *Thomas,* 123 Fed. 2d 353 (356) (November 17, 1941), the Court spoke as follows:

> "We think the Seventh Amendment denied to the court the power to increase the amount of the verdict in the instant case. This is not a case where the court denied a motion for a new trial on condition that plaintiff remit a portion of an excessive verdict, but a clear case of a change of the verdict of the jury. Except for such unusual cases, and the case of reservation of decision on motion for a directed verdict as provided by Rule 50 of the Rules of Civil Procedure, or the granting of a new trial, the verdict of the jury must be accepted as conclusive. Baltimore & Carolina Line, Inc. v. Redman, 295 U. S. 654, 55 S. Ct. 890,

79 L. Ed. 1636. *We do not think the court was at liberty to follow the practice of the State of Arkansas if that differed from that established by the rules of civil procedure.* United States v. Kennesaw Mountain Battlefield Assn., 5 Cir., 99 F. 2d 830. In actions at law, where issues of fact are submitted to the jury as they were in this case, the judgment must conform to and follow the verdict. Texas Compensation Ins. Co. v. Heard, 5 Cir., 93 F. 2d 548. Under the Seventh Amendment, the national courts are without power to add to a verdict in a common-law action. Dimick v. Schiedt, 293 U. S. 474, 55 S. Ct. 296, 79 L. Ed. 603, 95 A. L. R. 1150. *This is not a mere rule of procedure but is based upon the inhibition contained in the Seventh Amendment.* Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029." (Italics ours.)

In *U. S.* v. *Kennesaw Mountain Battle Field Association,* 99 Fed. 2d 830, 835, the Court among other things said:

> "And (3) the control of Federal trial courts over verdicts is governed by the decision of Federal courts, not those of state courts" (Citing cases)."

In a Breach of Contract Action There Is No Requirement That the Trial Judge Before Granting a Remittitur Must Be Able to Justify His Action With Mathematical Certainty and Precision.

Many of the cases above cited, beginning with *Blunt* v. *Little, supra,* and including *Arkansas Valley Land Co.* v. *Mann, supra,* and *Otte* v. *Otte, supra,* involve the question of an unliquidated claim for damages. Necessarily the value of these claims could not be ascertained with mathematical certainty any more so than could a claim for personal injury. The jury must necessarily speculate as to the amount of its verdict. In some instances the trial Court or the Appellate Court was of the opinion that the verdicts were too large and in order that justice might be done, the remittitur rule was adopted and thus litigation was curtailed and expense and time was saved. If Courts were powerless to remit a portion of a judgment unless they could with certainty determine the exact amount due a plaintiff, litigation would be interminable and justice would be throttled.

The District Court Did Not Err in Permitting Testimony of the Negotiations Leading Up to the Execution of the Contract.

In order that the Court may intelligently pass on the question raised under this heading by the petitioner, we submit a condensed statement of facts.

The petitioner, as its name implies, is engaged in the manufacture of wooden boxes and at its Louisville

plant constructs small boxes for the use of those engaged in the beer, soft drink and similar business. At each end of the box there is a metal strip placed around the sides and bottoms, for the purpose of strengthening and preserving the life of the container. These strips are commonly referred to as "box irons."

Respondent is engaged in the manufacture of tools and dies.

During the spring of 1947 General Box Company had negotiated with the Central Metal Products Company for the manufacture of the box irons. This work had formerly been done by the Louisville Tool & Die Company. Before entering into a contract with Central Metal Products Company, a discussion was had between the parties as to various terms of the contract and among others respondent was anxious to ascertain the number of irons which it could reasonably expect to manufacture and the petitioner was anxious to know whether or not Central Metal Products Company would be in a position to supply its needs with the required number of irons (T. R. 28, 38, 64, 65). The cost to respondent of manufacturing these irons was $5.2932 per thousand (T. R. 48), and the mean contract price as later agreed upon was approximately $13.80 per thousand (T. R. 49).

For one and a half years prior to May, 1947, petitioner had been using from 60 to 70 thousand box irons per month (T. R. 68). Testimony relative to these negotiations was given by Robert Lentz (T. R. 28), William McMahan (T. R. 38) and William C. Embry, Vice-President and General Manager of the

General Box Company (T. R. 64-65) and when counsel for respondent began to interrogate this last witness along the lines indicated, counsel for the petitioner stated, "He can interrogate him any way he chooses without any objection" (T. R. 64). This testimony was not introduced for the purpose of altering, contradicting or varying the terms of the contract but was for the sole purpose of showing the position of the parties, their intentions relative thereto and the preparations that respondent made to carry out the terms of the contract. The contract speaks for itself.

On May 19, 1947, a contract was entered into between the parties whereby the Central Metal Products Company was to manufacture box irons for the General Box Company for a period of sixteen months at a price of $3 or $4 per thousand cheaper than it at that time was paying for the same workmanship and material. A tool and die machine and a shearer for the cutting of the steel when it arrived at respondent's plant, were purchased and installed at a cost of approximately $4,500 and space was set aside for the purpose of carrying out the terms of its contract. Two cars of steel were consigned to the respondent by the petitioner shortly after the making of the contract for the purpose of enabling it to begin operations. Within a few days thereafter the petitioner prevailed upon the respondent to release the material and the Central Metal Products Company, acting in good faith and relying upon the statements of the officers of the petitioner corporation that there was an urgent

need for the steel at some of its other plants, relinquished the shipments and within a few days thereafter, much to respondent's surprise it was informed that the General Box Company had decided to abrogate the contract and would not comply with its terms. As is stated by the petitioner (T. R. 3) "The making of the contract was properly shown (R. 2-24) and the breach of the contract was not denied by the petitioner (R. 72). The question here involved is the amount of damages."

The evidence further shows that the petitioner continued purchasing the "iron bands" from the manufacturer who had theretofore produced them but at the reduced price submitted by respondent, and thus a saving of $3 to $4 per thousand was effected (T. R. 69).

In October, 1947, the respondent's officers and its attorney advised the petitioner that it would seek redress for the breach of its contract, whereupon the petitioner's business immediately receded and the recession was so great that notwithstanding the increase in business in all lines of industry throughout the country and notwithstanding the fact that the cost of petitioner's production was reduced by reason of the lower cost of manufacturing the box irons that by the time the trial was had, which was five months before the termination of the contract, the petitioner had practically ceased the manufacture of this type of box at its Louisville plant (T. R. 68-69).

In substantiation of our contention that the testimony above outlined was properly admitted for the

purposes heretofore announced, we quote from the following federal decisions:

In the case of *Lincoln National Life Ins. Co.* v. *Horwick,* 115 Fed. 2d 892, the Court made this comment:

> "In the first place, we think the oral testimony was properly admitted. We need not analyze the authorities upon which appellant relies to the effect that a written instrument, clear and unambiguous on its face, cannot be contradicted by parol evidence. This is a recognized rule. There is another rule, however, just as firmly established, and that is that parol or extrinsic evidence is admissible to explain the purpose of the execution of a written instrument, what the parties intended, the consideration for its execution and the circumstances surrounding its execution."

In the case of *Modoc County Bank* v. *Ringling,* 7 Fed. 2d 535, 540, the Court cited the following rule with approval:

> "It is a fundamental rule that in the construction of contracts the courts may look, not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same right which the parties possessed when the contract was made. Merriam v. U. S., 107 U. S. 437, 441, 2 S. Ct. 536, 540 (27 L. Ed. 531), citing Nash v. Towne, 5 Wall. 689, 18 L. Ed. 527; Barreda v. Silsbee, 21 How. 146, 161, 16 L. Ed. 86; Shore v. Wilson, 9 Cl. and Fin. 355, 555; McDonald v. Longbottom, 1 El. & El. 977; Munford v. Gething, 29 L. J. C. P. 110; Carr v. Montefiore, 5 B. & S. 407; Brawley v. United States, 96 U. S. 168, 24 L. Ed. 622."

The Courts of Kentucky are in accord with the rule announced by the federal judiciary, as shown by the following decisions. In *Morehead* v. *Citizens Deposit Bank,* 130 Ky. 414 (418), the Court said:

> "The first question is: Did J. T. Morehead occupy the relation of surety on a note of J. W. Morehead? For the purpose of determining this question, we are not confined solely to this instrument executed, but may consider parol evidence."

In the later case of *Myers Brothers* v. *Hager,* 266 Ky. 3, 98 S. W. 2d 36, in which an action was brought upon a contract relative to road material, the Court, among other things, said:

> "In construing their contract we must look to and consider all of its language, as well as the subject matter with which it deals, in the light of the circumstances accompanying the parties at its execution. It is our duty so to construe it as to give it such effect, and none other, as the parties to it intended at the time it was made. To this extent only was the parol evidence permissible."

See also *Lincoln National Life Insurance Co.* v. *Means,* 264 Ky. 566, 95 S. W. 2d 264, and cases cited therein.

Rule 43 of the Federal Rules of Civil Procedure among other things provides:

> "All evidence shall be admitted which is admissible under the Statutes of the United States, or under the rules of evidence heretofore applied

in the courts of the United States on the hearing of suits in equity or under the rules of evidence applied in the courts of general jurisdiction of the state in which the U. S. Court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

We submit that under both the Federal and State rule the testimony was competent.

We shall not lengthen this response with quotations from the evidence relative to the number of iron bands which petitioner would have required had it faithfully carried out the terms of its contract, save and except to say that the jury was within its rights in awarding the respondent a judgment of $19,000 and that the remittitur required by the trial judge which reduced respondent's judgment to the sum of $7,500 was far below the maximum amount which the evidence justified.

Since respondent was prevented by the wrongful action of petitioner from performing any part of the contract, the loss of profits must be an approximation. Under such conditions exact proof as to the loss is not required as shown by the following excerpt from the Kentucky Court of Appeals in *Gutseit* v. *Strader,* 158 Ky. 131:

"It may be that Gutseit had done but little mail order business; but where an express contract is violated, the court will not be over-nice

in requiring proof of actual loss; for this is hard to be shown."

In view of the foregoing, we ask that the petition for writ of certiorari be denied.

Respectfully submitted,

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